Supreme Court, U.S.
FILED
MAR 2 - 2010
OFFICE OF THE CLERK

No. 09-725

IN THE
Supreme Court of the United States

THOMAS M. BEAVER, M.D.;
SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.;
and THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Petitioners,

v.

PATRICIA DANNEMANN,

Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeal

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUSAN L. KELSEY
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun Street
Tallahassee, FL 32301
(850) 681-3511

Attorney for Petitioners

TABLE OF CONTENTS

REPLY 1

CONCLUSION 8

TABLE OF AUTHORITIES CITED

PAGES

CASES

Acosta v. Richter,
671 So. 2d 149, 156 (Fla. 1996) 7

Upjohn Co. v. United States,
449 U.S. 383, 389 (1981) 6

FLORIDA STATUTES

§ 456.057 1

§ 1004.24 1

§ 1004.41(4)(d) 1

OTHER AUTHORITIES

Florida Board of Governors Reg. 10.001 2

REPLY

It's Not About The Identity or Structure of the Insurance Provider

The Response consists largely of attempts to distract from the merits of the single right-to-counsel issue presented, which arises from the Florida court's interpreting section 456.057(8), Florida Statutes, as prohibiting Petitioners from communicating freely with their *own* legal counsel about the very subject matter Respondent seeks to address in deposing the individual Petitioners. Respondent's new argument consists of irrelevant and unfounded accusations against the self-insurance program that is required by law to provide coverage, litigation defense services, risk management, and claims management, to the University of Florida Board of Trustees and its employees, *and* to Shands Teaching Hospital & Clinics, Inc. and its employees.[1] Notably, however,

---

[1] Shands is a teaching hospital that provides a clinical setting for the University of Florida. The medical care at issue in the underlying case was provided at Shands, by physicians employed by UFBOT. A single self-insurance program, the University of Florida Self-Insurance Program, works with both as required by Florida law. *See* § 1004.24, Fla. Stat. (authorizing self-insurance programs); § 1004.41(4)(d), Fla. Stat. (authorizing the University

neither the Florida appellate decision under review [Pet. App. 1a], nor the trial court's underlying order [Pet. App. 5a], mentions these bare accusations at all, let alone addresses their merits (or lack thereof). They are classic red herrings, and deserve no attention.

The one utility of Respondent's rhetoric is to illustrate the great breadth to which Respondent is willing to extend the denial of the right to meaningful legal counsel. By Respondent's reasoning, individuals and entities who happen to be insured by the same company – a frequent occurrence particularly in the field of healthcare insurance where a very few companies cover the vast majority of insured institutions in a single market – are more limited in their right to meaningful assistance of legal counsel than are individuals covered by separate insurers. This logical extension of Respondent's argument illustrates its weakness, for it makes no sense and implicates fundamental constitutional principles to infringe on the constitutional right to counsel on the basis of whether a single insurance carrier covers more than one party to litigation. If there were ever a case where that connection were abused – and this

---

of Florida to provide Shands with "comprehensive general liability insurance including professional liability from a self-insurance trust program established pursuant to s. 1004.24"); *see also* Florida Board of Governors Reg. 10.001 (governing state university self-insurance programs).

is not such a case – there are specific, narrow remedies for it, but those available remedies *never* include deprivation of the right to counsel.

By further logical extension, Respondent's heavy reliance on phantom "abuses" of the attorney-client relationship [Resp. 4-5, 10-11], suggests that in all cases in which *no* such abuse occurs, individuals may have unfettered communications with counsel of their choice. No court has found any such abuse here, nor has Respondent even attempted to secure such a finding. *Ergo*, the right to counsel and to communicate freely with counsel must remain intact here.

It's Not Up To Plaintiffs To Dictate the Content of Attorney-Client Communications.

Respondent argues that because two of the UFBOT physician/deponents were pathologists who did not treat the decedent, and because all of the decedent's medical information was already contained in medical records, there could be no legitimate reason for the physicians to consult with legal counsel about that medical information. [Resp. 6-7] The complete answer to this argument is that it is no one's business – not the plaintiff's, not the trial court's, no one's – what a client wants to discuss with a lawyer. That again is the very nature of an attorney-client relationship, and it is why, for instance, the rules of attorney ethics prohibit an attorney from revealing even the fact or the purpose

of a consultation, without the client's consent. And, *if* it is dispositive that the physicians have no information outside of that contained in written medical records, where is the constitutional justification for Respondent's intense desire to separate these physicians from their legal counsel and then depose them?

If it were relevant at all to establish some reason that an outsider to the attorney-client relationship might find acceptable justification for the consultation, the record here more than amply supplies the need. First, Respondent called these three physicians to testify in a *legal* proceeding *about* the decedent's medical information. An undeniable logical connection ties together the situation – a deposition; the subject matter – medical care provided by the physicians or their co-employees; and legal counsel – the guide to legal rights and obligations. Second, physicians have legitimate concerns about their own personal exposure when being drawn into a lawsuit arising out of medical care they provided or as to which they have information. They do not even know if they *have* any exposure, either in the pending lawsuit, in a new lawsuit, in state regulatory proceedings, or with respect to their employment status and obligations to their employer, without consulting legal counsel – i.e., communicating meaningfully with counsel on the basis of the factual setting presented.

As to Respondent's claim that pathologists have no legitimate right to counsel because they did not "treat" the decedent, Respondent overlooks the investigatory role of a pathologist and the potential impact of such a physician's testimony on the employer's legal interests. This is, of course, precisely why Respondent wants to strip these physicians of their right to counsel, in hopes of using them as free expert witnesses to bolster the plaintiff's case. In sum, if their testimony is important enough to secure through deposition, then they have a right to legal counsel to determine their rights and the potential implications of their testimony. Though no disclosure of the content of attorney-client communication is required (or justifiable), all of these concerns more than suffice to demonstrate the legitimacy of the attorney-client consultations Petitioners seek to protect.

It's Not About "Retaining" Counsel.

Presenting another red herring, Respondent protests that no constitutional infirmity arises here, because the UFBOT-employed physicians have the right to "retain" counsel of their choice. [Resp. 10-11] This is not the issue. The issue is the right to "communicate" freely with legal counsel so as to have a meaningful attorney-client relationship. The Florida court ruled that the Florida statute on privacy of patient healthcare information must be construed to prohibit physicians from communicating with their legal counsel about *the very subject as to which those physicians are about to*

be deposed. It hardly matters that Respondent would allow the physicians' lawyers to sit in on the depositions – so long as there is no private attorney-client consultation – because by then the deprivation of the right to meaningful legal counsel has occurred already, and is perpetuated by restricting the communications that can take place during the deposition itself.

We ask again, as the trial court asked [Pet. App. 10a]: What legitimate state interest exists within the context of this case to prevent such a discussion? The Florida appellate court offered none, nor does Respondent. When pressed to engage in such a test, the Florida court declined, stating simply that the constitutional issue was necessarily decided, albeit *sub silentio*, in an earlier case, and would not be revisited. [Pet. App. 3a-4a]

The constitutional infirmity is plain. A lawyer deprived of the very information as to which legal advice is sought is no lawyer at all, because the essence of the attorney-client relationship is full and frank communication. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

It's Not About Revealing Medical Information To "Outsiders."

In the Response, all roads lead to the same phantom allegations of improper use of medical information [Resp. 12-13], leaving the merits of the real issue before the Court largely unaddressed.

Respondent attempts to invoke the Florida Supreme Court's prior decision prohibiting a defense lawyer from obtaining medical information about the plaintiff *from someone other than his own client,* without even acknowledging that clear and material factual distinction between that case and this one. *Acosta v. Richter,* 671 So. 2d 149, 156 (Fla. 1996). Respondent can point to nothing in the statute, nothing in *Acosta,* nothing in any other case, disclosing an intentional and knowing decision to prohibit a physician from communicating with that physician's *own legal counsel* about the very subject matter the physician must address in a deposition. Respondent can point to nothing whatsoever revealing a conscious recognition of the tension between the right to privacy and the right to counsel, let alone any attempt to assert a legitimate state interest justifying the subrogation of the latter to the former. Respondent has nothing to say on these points because there is no such authority. Nothing whatsoever establishes that the interpretation of the statute that the Florida court advanced, and that Respondent defends, was informed by a knowing analysis of these issues. It was not. Once subjected to the appropriate constitutional analysis, the Florida court's interpretation of the statute cannot stand.

CONCLUSION

The Court should grant the Petition, reverse the Florida court's decision, and remand for further proceedings in which the right to counsel – and specifically the right to communicate fully and freely with counsel – is fully protected.

Respectfully submitted,

Susan L. Kelsey
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun St.
Tallahassee, FL 32301
Ph. (850) 681-3511
Attorney for Petitioners

March 2, 2010